

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

COLLIE RAY JACKSON JR.,
Petitioner.

No. 2 CA-CR 2020-0061-PR
Filed June 22, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Maricopa County
No. CR2015005638001DT
The Honorable John Rea, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney
By Daniel Strange, Deputy County Attorney, Phoenix
Counsel for Respondent

Collie Ray Jackson Jr., Tucson
In Propria Persona

STATE v. JACKSON
Decision of the Court

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

ESPINOSA, Judge:

¶1 Petitioner Collie Jackson Jr. seeks review of the trial court’s ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.¹ We will not disturb that ruling unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Jackson has not met his burden of establishing such abuse here.

¶2 After a jury trial, Jackson was convicted of two counts each of armed robbery and kidnapping. The convictions were based on the robbery of a liquor store by Jackson and two accomplices using simulated handguns. The trial court found that Jackson had four prior felony convictions and that the instant convictions constituted “serious offenses” under A.R.S. § 13-706. The court sentenced him to four concurrent terms of life imprisonment without the possibility of release for twenty-five years.

¶3 Jackson initiated a proceeding for post-conviction relief, and appointed counsel filed a notice indicating he had reviewed the record but had been “unable to find any claims for relief” to raise in a Rule 32 petition. In his subsequent pro se petition, Jackson asserted the following claims: (1) the state failed to timely disclose a prior felony conviction of its witness, H.E., and the court erred in its treatment of that conviction and in not holding a hearing pursuant Rule 609, Ariz. R. Evid.; (2) the state failed to disclose an audio recording from the patrol car when he was arrested, and, if disclosed, his counsel was ineffective for failing to inform him of the recording; (3) his trial counsel provided ineffective assistance by failing to

¹ Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that “applying the rule or amendment would be infeasible or work an injustice.” *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

STATE v. JACKSON
Decision of the Court

investigate his case and prepare for trial, including by obtaining records from the hotel where he had been staying at the time of the robbery, and to keep him informed concerning his case; (4) the court erred in denying his request to change counsel, thereby violating his constitutional rights; (5) his trial counsel was ineffective because she failed to object, request a new trial, and “protect [his] rights” when “the state interfer[ed] with [his] alibi witness,” K.S., and prevented her from testifying; (6) the state failed to disclose that evidence used at trial contained DNA belonging to another person, I.E., and that fact constitutes newly discovered material evidence; (7) his “serious priors w[ere] never proved through fingerprints”; (8) a sentence of “25 to life is overbroad, cruel and unusual punishment” for his offenses; (9) § 13-706 is unconstitutionally vague; and (10) his appellate counsel provided ineffective assistance by failing to raise “everything [he raised] in this petition.”

¶4 After receiving the state’s reply and Jackson’s response, the trial court summarily dismissed the petition. It explained:

Although the petition raises several claims, the only claims that are not precluded are based on contentions of newly discovered evidence and ineffective assistance of counsel, apparently both trial and appellate.

The claim of newly discovered evidence fails both factually and for lack of prejudice.

The claims of ineffective assistance of counsel, both trial and appellate, do not state a colorable claim either as to deficient performance or prejudice.

This petition for review followed.

¶5 On review, Jackson reasserts his claims. He first repeats his claims of trial and sentence error: (1) “[l]ife in prison is overbroad, cruel and un[usual] punishment”; (2) § 13-706 is “unconstitutionally vague”; (3) the trial court erred in addressing H.E.’s prior felony conviction and violated Jackson’s due process rights in doing so; (4) the court “erred when it refused [Jackson’s] attempt to change counsel,” also violating his due process rights; (5) “[t]he state never proved [his] prior felony convictions

STATE v. JACKSON
Decision of the Court

through fingerprint match or expert”; and (6) the state committed a disclosure violation by failing to release DNA results identifying I.E.

¶6 When asserting a claim under Rule 32.1(a), a defendant is precluded from relief based on any ground “waived at trial or on appeal, or in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.” Ariz. R. Crim. P. 32.2(a)(3). Because the above-mentioned claims appear to fall under Rule 32.1(a), and Jackson has not suggested otherwise, we agree with the trial court that they are precluded.²

¶7 Jackson next repeats his claims of ineffective assistance of trial counsel, including that his counsel failed to: (1) inform him of the audio recording from the patrol car; (2) keep him apprised of the evidence against him; (3) investigate his case and prepare for trial; and (4) object or request a mistrial based on the state’s “interference” with his alibi witness and his inability to present a complete defense. The trial court did not abuse its discretion in determining these claims were not colorable.

¶8 “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim.” *Id.* Under the first prong of *Strickland*, “we must presume ‘counsel’s conduct falls within the wide range of reasonable professional assistance’ that ‘might be considered sound trial strategy.’” *State v. Denz*, 232 Ariz. 441, ¶ 7 (App. 2013) (quoting *Strickland*, 466 U.S. at 689). To establish prejudice under the second prong of *Strickland*, a defendant cannot meet his burden by “mere speculation.” *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999).

²To the extent Jackson’s claim concerning his prior convictions could be characterized as falling under Rule 32.1(c), we conclude he has waived the issue on review “because he cites no relevant authority and does not develop the argument in any meaningful way.” *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013); *see also* Ariz. R. Crim. P. 32.16(c)(2)(D) (petition for review must contain “reasons why the appellate court should grant the petition”).

STATE v. JACKSON
Decision of the Court

¶9 Even assuming his trial counsel failed to inform Jackson of the audio recording from the patrol car and such conduct fell below reasonable standards, Jackson has failed to establish prejudice. He seems to suggest he was prejudiced because his counsel’s conduct “deprived [him] of any opportunity to make a sound decision about going to trial or to take a plea.” But under *Strickland*, a defendant must establish there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Jackson did not include an affidavit asserting he would have accepted the state’s plea offer had he known about the audio recording. See Ariz. R. Crim. P. 32.7(e) (“The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition.”).

¶10 Regarding Jackson’s claim that his trial counsel failed to keep him apprised of the evidence against him, Jackson admits that he received “over 600 pages of discovery” in November 2016. His trial did not start until February 2017, giving him approximately three months to review the evidence. He has provided no affidavits or other evidence suggesting that his counsel’s conduct fell below reasonable standards. See Ariz. R. Crim. P. 32.7(e). Jackson has therefore not overcome our assumption that his counsel’s conduct fell within the wide range of reasonable professional assistance.

¶11 As for Jackson’s claim that his trial counsel failed to investigate his case and prepare for trial, the only specific example he provides is that his counsel did not obtain records from the hotel where he was staying, suggesting it would have provided an alibi. But Jackson has not met his burden of showing how the hotel records would have changed the outcome of the case, particularly in light of surveillance video from the robbery. Cf. *State v. Atwood*, 171 Ariz. 576, 600 (1992), *disapproved of on other grounds by State v. Nordstrom*, 200 Ariz. 229 (2001) (defendant failed to establish prejudice where he offered “no proof” that additional investigations “would have yielded anything valuable to the defense”).

¶12 Finally, regarding Jackson’s assertion that his trial counsel was ineffective for failing to object or request a mistrial based on the state’s “interference” with his alibi witness, K.S., this court rejected on appeal Jackson’s similar argument that the trial court should have sua sponte granted a mistrial. *Jackson*, No. 1 CA-CR 17-0286, ¶¶ 15-17. As we previously explained, no error occurred because after the court informed Jackson that he could call K.S. as a witness, he chose not to do so – perhaps

STATE v. JACKSON
Decision of the Court

as a matter of strategy – and K.S. was not given the opportunity to invoke her Fifth Amendment right to remain silent. *Id.* In addition, Jackson has failed to establish prejudice. He argues he was prejudiced because the jury had “a chance to consider” the state’s “witnesses, evidence and [theory], but not [his],” suggesting the jury may have reached a different conclusion had they heard from K.S. But such speculation is insufficient under *Strickland*. See *Rosario*, 195 Ariz. 264, ¶ 23.

¶13 Jackson also reurges his claim of ineffective assistance of appellate counsel, suggesting that all his claims of trial and sentence error should have been raised on appeal. But neither below nor on review has he offered any meaningful argument or evidence suggesting that counsel’s performance fell below objectively reasonable standards. See Ariz. R. Crim. P. 32.7(e); see also *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013). In addition, he offers no argument as to how he was prejudiced, instead suggesting that this court should not treat the claims as precluded in this proceeding to remedy appellate counsel’s purported error. Accordingly, the trial court did not abuse its discretion in finding this claim not colorable.

¶14 Lastly, Jackson reasserts his claim of newly discovered material evidence, suggesting that evidence – specifically, a pair of black gloves – used at his trial was later determined to contain DNA belonging to I.E. But, as Jackson recognizes, the jury at his trial heard the gloves contained DNA belonging to an “[u]nknown male.” He fails to explain how any subsequent identification of that male as I.E. was relevant or would have likely changed the verdicts. See *State v. Amaral*, 239 Ariz. 217, ¶ 9 (2016) (listing five requirements for colorable Rule 32.1(e) claim: (1) evidence must appear to have existed at time of trial but be discovered afterward; (2) petition must allege facts from which court could conclude defendant was diligent in discovering facts and bringing them forward; (3) evidence must not be cumulative or impeaching; (4) evidence must be relevant; and (5) evidence must be such that it would likely have altered verdict or sentence). Accordingly, the trial court did not abuse its discretion in rejecting this claim.

¶15 For the reasons stated above, the petition for review is granted, but relief is denied.